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No. 91-1399

In the Supreme Court of the United States

OCTOBER TERM, 1991

UTE DISTRIBUTION CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

RICHARD FARBER
ROBERT W. METZLER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether 25 U.S.C. 677p provides an exemption from the federal income tax for cash distributions made to Indian and non-Indian shareholders by the Ute Distribution Corporation in 1984.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 938 F.2d 1157. The opinion of the district court (Pet. App. A14-A28) is reported at 721 F. Supp. 1202.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1991. The petition for rehearing was denied on December 2, 1991 (Pet. App. A29-A30). The

petition for a writ of certiorari was filed on February 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 17 of the Ute Indian Supervision Termination Act of 1954, 25 U.S.C. 677p, provides as follows:

> **Tax exemption; exceptions and time limits; valuation for income tax on gains or losses**
>
> No distribution of the assets made under the provisions of this subchapter shall be subject to any Federal or State income tax: *Provided*, That so much of any cash distribution made [under this subchapter] as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of this subchapter be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of this subchapter shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: *Provided*, That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of this subchapter, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except

that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to this subchapter.

STATEMENT

1. Petitioner Ute Distribution Corporation (UDC) is a Utah corporation organized pursuant to the Ute Indian Supervision Termination Act of August 27, 1954 (commonly known as the Ute Partition Act), ch. 1009, 68 Stat. 868, 25 U.S.C. 677-677aa). The other petitioners are four stockholders of that corporation, who received distributions of cash from it in 1984, and two spouses of those stockholders.

The Ute Partition Act was one of a series of enactments during the 1950s and 1960s designed to terminate the federal government's special relationship with certain Indian tribes. See generally F. Cohen, *Handbook of Indian Law* 811-817 (1982). A significant impetus for that termination legislation came in 1949, when the Commission on the Organization of the Executive Branch of the Government (commonly known as "the Hoover Commission") issued a report to Congress on Indian affairs. See Commission on Organization of the Executive Branch of the Government, *Report to Congress* 53-81 (Mar.

1949). The Hoover Commission recommended that a "program for the Indian peoples must include progressive measures for their complete integration into the mass of the population as full, tax-paying citizens." *Id.* at 65.

In formulating a policy to implement these recommendations, House Concurrent Resolution 108 (H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953) (67 Stat. B132) stated that:

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians * * * subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; * * *.

The resolution designated certain tribes as candidates for immediate termination and directed the Secretary of the Interior to recommend legislation to Congress by January 1, 1954, that would accomplish the purposes of the resolution. H.R. Con. Res. 108, *supra.*

In 1954, Congress enacted six different termination Acts, including the Ute Partition Act.[1] These Acts

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[1] The other termination Acts were as follows: Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) formerly 25 U.S.C. 891-902 (1970)) (Menominee Tribe); Act of August 13, 1954, ch. 732, 68 Stat. 718 (25 U.S.C. 564-564w-2 (Klamath Tribe); Act of August 13, 1954, ch. 733, 68 Stat. 724 (25 U.S.C. 691-708) (60 tribes and bands in Western Oregon); Act of August 23, 1954, ch. 831, 68 Stat. 768 (25 U.S.C. 721-728 (Alabama and Coushatta Tribes of Texas); Act of September 1, 1954, ch. 1207, 68 Stat. 1099 (25 U.S.C. 741-760) (Southern Paiute Tribe).

generally provided for the termination of federal supervision over the pertinent tribe or band. In addition, all but one of the Acts contained a tax provision that specified how distributions of tribal property or assets and income relating thereto would be taxed.[2] The tax provisions in the termination Acts other than the Ute Partition Act generally stated that distributed tribal property would not be subject to tax at the time of distribution, but following distribution the property and income therefrom would be subject to tax.

The Ute Partition Act addressed a situation that was different from those addressed by the other termination Acts enacted in 1954. The mixed-blood members and the fullblood members of the Ute Indian tribe had different views about their readiness for termination. "[T]he majority of the mixed blood group fe[lt] that they [were] ready for a termination of Federal supervision over their property and the fullblood Indians believ[ed] that they [were] not ready for such action." H.R. Rep. No. 2493, 83d Cong., 2d Sess. 2 (1954); S. Rep. No. 1632, 83d Cong., 2d Sess. 5 (1954). Accordingly, Congress was faced with the problem of partitioning the tribal property between the terminated and non-terminated groups. The partition was accomplished by first preparing rolls of the full-blood members and the mixed-blood members. See 25 U.S.C. 677g. The divisible assets were then divided based upon the relative num-

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[2] See 25 U.S.C. 564j, 677p, 699, 749, and 898 (repealed 1973). The only termination Act that did not contain a tax provision (25 U.S.C. 721-728) essentially placed the State of Texas in the trust position that had previously been held by the United States and was fundamentally different from the other termination Acts. See H.R. Rep. No. 2491, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. Code Cong. & Ad. News 3119.

ber of persons comprising the membership roll of each group; the nondivisible assets, which in large part consisted of subsurface oil, gas and other mineral rights (Pet. App. A3), were allocated "between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of the proceeds." 25 U.S.C. 677i.

Pursuant to the plan adopted in the Ute Partition Act, the mixed-bloods organized the Affiliated Ute Citizens (AUC) and empowered its board of directors to act as their authorized representative. The mixed-bloods approved a plan for a division of the tribal assets that was adopted by the Tribal Business Committee and the AUC. Under this plan, most of the divisible assets were directly transferred to the mixed-bloods. With respect to the nondivisible assets, however, the plan provided for the formation of a corporation that was jointly to manage the assets with the Tribal Business Committee, receive the income therefrom that represented the share of the mixed-blood group and distribute that income to its shareholders. Pet. App. A3.[3]

UDC was formed for these purposes in late 1958. Each mixed-blood listed on the rolls received ten shares of UDC stock. The stock was immediately transferable.[4] If a mixed-blood Ute sold his stock to

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[3] In 1956, Congress amended the Ute Partition Act to add an exception for corporate income taxes that would otherwise be imposed on that corporation with respect to the income it received on the nondivisible assets. Act of August 2, 1956, ch. 880, 70 Stat. 936.

[4] The only restriction placed on transfer was a right of first refusal given to the members of the Ute Indian Tribe until August 26, 1964. Pet. App. A4.

a non-Indian, the non-Indian purchaser was entitled to receive the distributions of income from UDC.[5] The termination of the mixed-blood members of the Ute Indian Tribe was completed when the Secretary of the Interior issued a proclamation effective August 27, 1961, declaring that "[a]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable [to the mixed-bloods]." 26 Fed. Reg. 8042 (1961).

2. During 1984, UDC made cash distributions of income earned on the nondivisible assets to its stockholders. The individual petitioners received their proportionate shares, but excluded the distributions from UDC from the income reported on their income tax returns for 1984. The IRS audited those returns, determined that the excluded income was taxable and assessed tax deficiencies against each of the individual petitioners. The individual petitioners thereafter paid the assessed amounts and filed timely claims for refund, which were disallowed. Petitioners then filed suit in federal district court.[6] Pet. App. A5.

In district court, petitioners contended that 25 U.S.C. 677p granted any UDC stockholder, whether Indian or non-Indian, a complete exemption from tax on any distributions of cash or property received from UDC. Petitioners also maintained that, in the event the court rejected their interpretation of the statute, its ruling should be applied prospectively only. The government contended that the plain language of

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[5] Petitioner Chris Denver is a non-Indian who purchased stock from a mixed-blood Ute. Pet. App. A4-A5 n.2.

[6] UDC sought refunds of penalties and interest for 1984 and 1985 and a declaratory judgment that it was not required to file 1099 information returns. Those claims are not at issue here.

the statute made all distributions from UDC to its shareholders after August 27, 1961, fully taxable. Pet. App. A22-A23.

The district court concluded that the government's interpretation was correct. The statute provides that "all property distributed [after an initial seven-year period ending August 27, 1961] and all income derived therefrom * * * shall be subject to the same taxes, State and Federal, as in the case of non-Indians." 25 U.S.C. 677p. The only exemption granted by the statute, for the period after August 27, 1961, was for corporate income taxes for the corporations (such as UDC) that were organized by the mixed-blood members to aid in the joint management and distribution of the nondivisible assets. *Ibid.* Since the tax at issue in this case was not assessed on the corporation, but on the individuals who received distributions from the corporation, the tax was not proscribed by the statute. Pet. App. A23-A24.

The court also noted (Pet. App. A25) that there was no basis in logic, nor policy in the statute, to justify a tax exemption (after August 27, 1961) for mixed bloods on distributions received from UDC. The district court nevertheless concluded, that "although today this court has ruled that UDC distributions are taxable, as a matter of fundamental fairness this ruling shall apply prospectively only. That is, the taxable status of UDC distributions as applied to individual shareholders shall commence with the tax year 1989" (*id.* at A26). The district court therefore concluded (*id.* at 27a-28a) that the distributions received by the individual petitioners in 1984 were not subject to tax.

3. All parties appealed the judgment of the district court. The court of appeals held (Pet. App. A6) that 28 U.S.C. 2201 precluded the district court from

exercising jurisdiction over claims seeking declaratory judgments relating to federal taxes. The court further held that the "district court properly concluded [that] UDC income distributions made after August 27, 1961 are subject to federal income tax" (Pet. App. A10). Finally, the court of appeals held (*id.* at A12-A13) that the district court erred in applying its decision only prospectively. The court therefore reversed the award of refunds to the individual petitioners (*ibid.*).

ARGUMENT

The court of appeals correctly held that the cash distributions received by the Indian and non-Indian shareholders of UDC in 1984 were subject to federal income tax because Section 17 of the Ute Partition Act, 25 U.S.C. 677p, does not exempt that income from tax. This decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Under the Internal Revenue Code, the income of every individual "from whatever source derived" is subject to the income tax. 26 U.S.C. 1, 61(a). Through this sweeping language, Congress intended to exert "the full measure of its taxing power." *HCSS-Laundry* v. *United States*, 450 U.S. 1, 5 (1981) (per curiam); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955); *Helvering* v. *Clifford*, 309 U.S. 331, 334 (1940). It is thus well settled that "every element of gross income of a person, corporat[ion], or individual, is subject to tax unless there is a statute or some rule of law that exempts that person or element." *HCSS-Laundry* v. *United States*, 450 U.S. at 5. Adhering to that basic principle, this Court has consistently held that "Indians are citizens and

that in the ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); accord, *Choteau* v. *Burnet*, 283 U.S. 691 (1931). The cash distributions that the UDC shareholders received in 1984 were thus unquestionably subject to federal income tax unless specifically exempted from the tax by statute or treaty.

Petitioners err in contending (Pet. 13-16) that 25 U.S.C. 677p exempts the income distributed by UDC in 1984 from income taxation. By its terms, Section 677p provides a tax exemption for UDC distributions for the limited period of time expiring on August 27, 1961. The statute begins by stating that "[n]o distribution of the assets * * * shall be subject to any Federal or State income tax." 25 U.S.C. 677p. That exemption, however, is limited by the subsequent clause, which states that "[a]fter seven years from August 27, 1954, *all property distributed* to the mixed-blood members of the tribe under the provisions of this subchapter, and *all income derived therefrom by the individual*, corporation, or other legal entity, shall be subject to the same taxes, State and Federal as in the case of non-Indians." *Ibid.* (emphasis added). By virtue of that subsequent clause, all property distributed by UDC *after* August 27, 1961, is not within the limited tax exemption created in the first sentence of the statute. Such distributions are therefore subject to the same federal tax applicable to taxpayers generally.

The cash distributions received by the petitioners in 1984 from UDC consist of amounts that UDC earned on the nondivisible assets it held. For non-Indian distributees, there is no doubt that the distri-

bution of earnings by a corporation to its shareholders is not tax exempt. See 26 U.S.C. 61; *HCSS-Laundry* v. *United States*, 450 U.S. at 5; *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. at 429. Since 25 U.S.C. 677p provides that all post-1961 distributions of property, as well as income derived therefrom, are to be subject to the same federal and state taxes "as in the case of non-Indians" (*ibid.*), it follows that the distributions of income received by the individual petitioners in 1984 from UDC are subject to the federal income tax.

Petitioners' attempt (Pet. 14-15) to avoid the clear mandate of Section 677p is based on a tortured and illogical construction of that provision. Petitioners maintain that the time-limitation clause in Section 677p should be read as if it said that "after 1961, the property distributed is subject to property tax, as is any income derived from that property such as capital gains from its sale or rental income" (Pet. 15). Thus, petitioners conclude that the time-limitation clause applies only to property taxes and that *all* distributions of property (including cash) made by UDC to its shareholders—regardless whether the distributions are made before or after August 27, 1961, and regardless whether such shareholders are Indians or non-Indians—are exempt from the federal income tax.

Petitioners' contention that the time-limitation clause in 25 U.S.C. 677p is limited to property taxes is simply wrong. The time-limitation clause expressly states that the taxes encompassed by it are the "same taxes, State and Federal, as in the case of Non-Indians." *Ibid.*[7] It does not state, as petitioners

[7] The petitioners maintain (Pet. 21-22) that the Ute Partition Act should be read *in pari materia* with the other termi-

would have it, that it applies solely to property taxes. In addition, petitioners' argument ignores the fact that the time-limitation clause *itself* includes an exception for "corporate *income* taxes" (*ibid.*) (emphasis added) for corporations such as UDC. If the time-limitation clause encompasses only property taxes, there obviously would have been no need for Congress to provide a special corporate *income* tax exemption from the scope of that clause.

Even if one made the unsupported assumption that the phrase "all property distributed" in the time-limitation clause of 25 U.S.C. 677p should be understood to refer only to property distributed prior to August 27, 1961, as petitioners contend (Pet. 15), the UDC distributions in 1984 would still be taxable. When UDC was formed, its stock was distributed tax-free to each member of the mixed-blood group. The distributions made by the corporation in 1984 represent "income derived" from the ownership of *that* property and it is the recipient's status as a stockholder that entitles him to the income. If this were not the case, petitioner Chris Denver, and other UDC shareholders who are not Indians, would not be

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nation statutes enacted in 1954. Four of those Acts (25 U.S.C. 564j, 699, 749, and 898 (repealed 1973)) state that certain property and income therefrom shall be subject to "the same taxes, State and Federal, as in the case of non-Indians." *Ibid.* In each instance, it is readily apparent that the taxes to which the property and income are subject include income taxes. There is no valid reason to assume that when Congress in 25 U.S.C. 677p used the phrase "the same taxes, State and Federal, as in the case of non-Indians", it intended for it to have a different meaning. The *in pari materia* principle of construction thus undermines, and does not support, petitioners' contention that the time-limitation clause in 25 U.S.C. 677p applies only to property taxes.

entitled to receive distributions from UDC. Even if the distributions at issue were thought to be outside the scope of the phrase "all property distributed," they clearly come within the subsequent statutory phrase "income derived therefrom." Thus, even under petitioners' erroneous reading of the statute, the distributions made by UDC in 1984 do not qualify for the limited tax exemption contained in 25 U.S.C. 677p.

The court of appeals was therefore correct in holding that, "[a]ccording to the plain language of section 677p, UDC shareholders must pay federal income tax on all distributions received after August 27, 1961" (Pet. App. A8-A9).

2. Officials of the Department of the Interior who had "oversight responsibility for the Ute Indian Tribe and UDC" (Pet. App. 19a n.8) had originally expressed the view that distributions made by UDC were tax-exempt (*id.* at 19a). Petitioners err in contending that the decision in this case—which is based on the plain language of the statute—conflicts with the "principle that an agency's interpretation of an ambiguous statute it administers is entitled to deference" (Pet. 16).

As this Court has frequently observed, when "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). See also *West Virginia University Hospitals, Inc.* v. *Casey*, 111 S. Ct. 1138, 1147 (1991). That rule applies even when an administrative interpretation is at odds with the plain language of the statute. *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Board of Governors*

of the Federal Reserve System v. *Dimension Financial Corp.*, 474 U.S. 361, 368 (1986); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

For the same reason, petitioners are also wrong in contending that the court of appeals failed to apply the canon of construction that "ambiguous provisions in statutes are to be construed liberally in favor of Indians" (Pet. 17). As this Court has stated on numerous occasions, "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Accord, *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 555 (1987); *Oregon Fish & Wildlife Dept.* v. *Klamath Indian Tribe*, 473 U.S. 753, 744 (1985); *Rice* v. *Rehner*, 463 U.S. 713, 732-733 (1983); *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 619 (1980). None of the cases cited by petitioners concerning the resolution of statutory ambiguities in favor of Indians (Pet. 16-19) holds that this canon may be used as a license to disregard the intent that Congress has clearly expressed in the plain language of the statute. This Court has expressly rejected that extreme proposition. *Andrus* v. *Glover Construction Co.*, 446 U.S. at 619 (quoting *Decoteau* v. *District County Court*, 420 U.S. 425, 427 (1975)).[8]

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[8] There is a "settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 355 (1988). See also *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969). This Court "has applied that rule to taxing acts affecting Indians as to all others." *Oklahoma Tax Comm'n* v. *United*

3. Petitioners also contend (Pet. 19-25) that the decision below merits review because it conflicts with various policies and considerations pertinent to Indians. Neither the policy behind the Ute Participation Act nor any other considerations that are relevant to that Act support petitioners' claim.

The policy behind the Ute Participation Act was that of making Indians "as rapidly as possible * * * subject to the same laws and entitled to the same privileges and responsibilities" as non-Indian citizens. H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953); 67 Stat. B132. It is inconsistent with that policy to award Indian *and* non-Indian stockholders of UDC a tax exemption in perpetuity for income distributed by that corporation.

Furthermore, contrary to petitioners' claim (Pet. 20-21, 22-23), there is nothing inconsistent about taxing the *income* distributions received by shareholders of UDC and the fact that the federal trust status over the indivisible assets has not been terminated. The property that gives rise to the entitlement to UDC distributions is the UDC stock. Unlike the indivisible assets that are held by the United States in trust, the UDC stock may be freely sold by a terminated Ute to non-Indians. As this Court stated in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), "although the undivided interests * * *

States, 319 U.S. 598, 606 (1943). See also *Choteau* v. *Burnet*, 283 U.S. 691, 696-697 (1931). While it may be true that the principle that disfavors tax exemptions must be balanced against the principle that doubtful expressions are to be construed in favor of Indians, the convergence of the two principles does not eliminate the requirement of "express exemptive language." *United States* v. *Anderson*, 625 F.2d 910, 913 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981).

held by UDC and shared with the full-bloods remained subject to restrictions * * * [t]he UDC stock, itself, * * * was free of restriction; as to it, federal termination was complete." *Id.* at 150.

Petitioners also err when they contend that the decision below results "in disparate tax treatment of terminated Utes vis-a-vis all other Indians terminated by the Eighty-third Congress" (Pet. 22). The other termination Acts contemplated that the tribal property would be distributed promptly to the terminated Indians and that the income from that property would be taxable within a relatively short period of time. As the court of appeals correctly recognized, the Ute Partition Act "involved the unique problem of distributing indivisible assets" (Pet. App. A11). If the nondivisible assets had been susceptible of equitable and practical distribution, they would have been transferred to the mixed-blood members prior to August 27, 1961, and the income thereafter realized would have been fully taxable to the recipients. Instead of receiving the indivisible assets themselves, however, the terminated Utes received (tax-free) shares of stock, which entitle them to proportionate distributions of the income received by UDC as long as they retain ownership of their stock. The terminated Utes may sell their stock at any time to non-Indians, as well as Indians. There is thus no inconsistency between the tax treatment of the terminated Utes and the treatment of other terminated Indians under similar termination Acts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

RICHARD FARBER
ROBERT W. METZLER
Attorneys

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